Sprinkler Fitters Local 703, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO *and* Airco Carbon, Div. of Airco, Inc. and Gross Plumbing and Heating Company, Inc. and Laborers International Union of North America, Local No. 91, AFL-CIO and Oil, Chemical and Atomic Workers International Union, Local 8-615. Case 3-CD-539

May 28, 1982

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Airco Carbon, Div. of Airco, Inc., herein called Airco, alleging that Sprinkler Fitters Local 703, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, herein called the Sprinkler Fitters, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring Gross Plumbing and Heating Company, Inc., herein called Gross Plumbing, to assign certain work to its members rather than to employees represented by Laborers International Union of North America, Local No. 91, AFL-CIO, herein called the Laborers.[1]

Pursuant to notice, a hearing was held before Hearing Officer Marjorie Murray on September 8 and 21, 1981. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE CHARGING PARTY

The parties stipulated, and we find, that Airco, a New York State corporation with its principal place of business in Niagara Falls, New York, is engaged in the manufacture of graphitized electrodes and anodes. During the past year, Airco purchased and received goods and materials having a value in excess of $50,000 shipped directly to it from points outside the State. The parties also stipulated, and we find, that Airco is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that the Sprinkler Fitters and the Laborers are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

During the spring of 1981,[2] Airco invited bids among area contractors, including Gross Plumbing, to revamp the water system at its Niagara Falls plant. Gross Plumbing submitted its bid on June 11, and it was accepted in early July. A formal contract with Airco was signed on July 26.

John A. Figler, superintendent for Gross Plumbing, testified that, sometime in June, William G. Thompson, the Sprinkler Fitters business manager, called him to discuss the awarding of the contract to install a dual-purpose water sprinkler and domestic waterline at the Airco jobsite. Figler told Thompson that Gross Plumbing was the low bidder but no award had yet been made. Thompson then asked Figler who Gross Plumbing was going to put on the job. Figler replied that if it received the job it would employ workers from the Laborers and the OCAW. Thompson responded that the proposed work at Airco was sprinkler fitters' work. Figler suggested that he discuss the matter with the Laborers and the OCAW.

On August 3, the Sprinkler Fitters began picketing at the Airco jobsite with signs bearing the legend "Information Only, Persons Employed by John J. Gross Plumbing and Heating Inc. on this job site to perform sprinkler fitters' work are not members of Sprinkler Fitters Union, Local 703, United Association of the Plumbers and Pipefitters International affiliated with the AFL-CIO."

Arthur A. Hensel, personnel manager at Airco, testified that on August 4 he called the Sprinkler Fitters headquarters in the hope that it would remove the pickets from the worksite so that emergency repair work could be done at the plant by an electrician who refused to cross the picket line. Ac-

[1] A representative of Oil, Chemical and Atomic Workers International Union, Local 8-615, herein called the OCAW, appeared at the hearing but disclaimed any interest in the work in dispute.

[2] All dates are in 1981 unless otherwise stated.

cording to Hensel's testimony, Thompson refused his request, adding, however, that something might be arranged as to the picket if Airco were willing to sign a contract with the Grinnell Company, a contractor that had a collective-bargaining agreement with the Sprinkler Fitters. The next day Thompson called Hensel and while talking about the emergency work at Airco mentioned that the situation could be resolved if Airco pulled Gross Plumbing off the job and used the Grinnell Company. On August 6 Hensel called Thompson and told him that Airco was satisfied with Gross Plumbing and unwilling to change contractors.

According to Thompson's testimony, he called Figler several times between the last week in June and the second week in July to find out whether Gross Plumbing was going to sign a successor contract with Respondent,[3] and whether Gross Plumbing was going to work on the Airco project. Thompson averred that Figler was evasive, claiming that Gross Plumbing had made no decision on the contract and that the Airco job was still uncertain.

As to the emergency work at the Airco plant, Thompson testified that on August 4 he received a call from Henry T. Shiro, International representative of the OCAW, who told him that a fire had taken place at the Airco plant, and asked him to call Hensel in order to allow the pickets to be removed so that emergency repairs could be made. Thompson called Hensel the next day, but no agreement could be reached and the pickets remained. However, Thompson asserted that during their discussion he stated that he would remove the pickets if Hensel would remove the Gross Plumbing workers from the plantsite during the time that repairs were being made. Thompson also asked Hensel to drop the unfair labor practice charges he had filed with the Board on August 4. Thompson called Hensel again on August 6, and in the course of their conversation told Hensel that, if Airco had any problem with Gross Plumbing in the installation of the piping, the "Grinnell [Company] would be glad to sit down and talk about the work." The picketing continued until August 21, 1981.

B. *The Work in Dispute*

The parties at the hearing stipulated that the work in dispute involves the installation of dual-purpose waterlines at Airco's Niagara Falls worksite.

[3] The Sprinkler Fitters had a collective-bargaining contract with Gross Plumbing which expired on June 30, 1981. There is no evidence in the record, however, that Gross Plumbing had hired employees represented by that Union during the time the contract was in effect. It should be noted that Figler denied knowledge of any existing contractual relationship.

C. *Contentions of the Parties*

Airco contends that the Sprinkler Fitters violated Section 8(b)(4)(D) of the Act by seeking to compel the assignment of the disputed work to its members. Gross Plumbing submits that the evidence shows that its employees represented by the Laborers are entitled to the disputed work.

The Sprinkler Fitters takes the position that the 10(k) notice should be quashed. It asserts that it has expressly disclaimed the work in dispute; that at no time did it seek to displace Gross Plumbing's employees; and that it has engaged in peaceful picketing to compel Gross Plumbing to execute a successor collective-bargaining agreement. It notes that the record is devoid of any threats on its part towards employees working at the Airco site or attempts by the pickets to interfere with entering or leaving site. In addition, the Sprinkler Fitters contends that the Laborers, Gross Plumbing, and itself are obligated through existing collective-bargaining agreements to submit their jurisdictional disputes to the Joint Board for Settlement of Jurisdictional Disputes for determination.

The Laborers asserts that the Sprinkler Fitters disclaimer of the work in dispute on the second day of the hearing should not be given effect. In addition, it contends that the record supports the assignment of the disputed work to employees represented by it who are in the employ of Gross Plumbing.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

The record contains testimony that the Sprinkler Fitters business manager, Thompson, told Figler, the superintendent for Gross Plumbing, that the Airco job was sprinkler fitters' work. There is also testimony that Thompson told Airco Personnel Manager Hensel that the picketing of the Airco jobsite could be resolved if Airco took Gross Plumbing off the job and instead used the Grinnell Company, which has a contract with the Sprinkler Fitters. The record also contains evidence which conflicts with the above testimony. However, in a proceeding under Section 10(k) of the Act, the Board is only required to find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated before making a determination of the dispute out of which the alleged unfair labor prac-

tice has arisen. In so finding, we need not conclusively resolve conflicts in testimony.[4] Accordingly, we conclude that there is reasonable cause to believe that the Sprinkler Fitters picketed with an object of forcing Airco to assign the work in dispute to a contractor who would hire employees it represents in violation of Section 8(b)(4)(D).[5]

At the close of the hearing, the parties stipulated that the work in dispute at the Airco plantsite was the installation of dual-purpose pipes. The attorney for the Sprinkler Fitters then announced that his client had no interest in installing dual-purpose pipes. The Board has found that there is no dispute where one of the competing groups has effectively disclaimed the disputed work.[6] However, the Board has given no effect to a hollow disclaimer; that is, a disclaimer presented for the purpose of avoiding an authoritative decision on the merits.[7] That is the case presented here. By the last day of the hearing, it would appear that much of the disputed work had been completed. Indeed, the entire project at the Airco site was expected to be finished around the end of October. There was therefore little left for the Sprinkler Fitters to disclaim. Further, the Sprinkler Fitters waited until the end of the hearing to assert its disclaimer. Thus, we conclude that the Sprinkler Fitters did not desire to resolve the dispute in this case and was seeking to escape the consequences of its unlawful actions. Under these circumstances, such an empty disclaimer cannot be given effect.

We also find without merit the Sprinkler Fitters contention in its "Supplemental Memorandum" that the parties have an agreed-upon method for the voluntary settlement of the dispute. Both the Sprinkler Fitters and the Laborers, as members of the Building and Construction Trades Department, AFL-CIO, are signatory to the agreement establishing the Joint Board for Settlement of Jurisdictional Disputes and as such are obligated to submit their jurisdictional disputes to the Joint Board for determination. Similarly, Gross Plumbing is likewise bound by virtue of its collective-bargaining contract with the Laborers. However, we are administratively advised that since June 1, 1981, the Joint Board has been inoperative, has ceased hearing such disputes, and is incapable of administering or policing a determination. In these circumstances, we do not view the obligation by the parties herein to submit its work disputes to the Joint Board to be determinative of this case.[8]

On the basis of the entire record, we conclude that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.[9] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[10]

The following factors are relevant in making the determination of the dispute before us:

1. Collective-bargaining agreements

Gross Plumbing has, or has had, collective-bargaining agreements with both the Laborers and the Sprinkler Fitters. Only the agreement with the Laborers is current, and that agreement does not mention the work in dispute. It does, however, contain provisions covering "trench digging." To the extent that trenches must be dug to prepare for the installation of the waterlines involved, it may be argued that these provisions favor an award, at least of that portion of the work, to laborers. The flaw in this argument is that the evidence does not indicate whether the digging of trenches is considered to constitute an element of the disputed work. Certainly, the actual installation of the pipes is not encompassed by the term "trench digging." Consequently, the ambiguity inherent in the meaning of "trench digging" *vis-a-vis* the disputed work and its scope requires us to reject any such argument. We therefore cannot accord any weight to the laborers agreement with Gross Plumbing in determining this jurisdictional dispute.

As for the expired agreement with the Sprinkler Fitters, it includes a jurisdictional provision, i.e.,

[4] *International Brotherhood of Electrical Workers, Local Union 103 of Greater Boston (Maki Electrical, Inc.)*, 227 NLRB 1745 (1977).

[5] *Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO (Western Electric Company, Incorporated)*, 141 NLRB 888 (1963).

[6] *Local Union No. 55, Sheet Metal Workers International Association, AFL-CIO (Gilbert L. Phillips, Inc.)*, 213 NLRB 479 (1974).

[7] *Laborers' International Union of North America, Laborers' District Council of Western Pennsylvania and Local 910, AFL-CIO (Brockway Glass Company, Inc.)*, 226 NLRB 142, 143, 144 (1976).

[8] *Millwrights Local Union No. 1862 and Spokane District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Jelco, Inc.)*, 184 NLRB 547 (1970); *Local Union No. 42, Laborers International Union of North America, AFL-CIO (R. B. Cleveland Company)*, 184 NLRB 686 (1970).

[9] *N.L.R.B. v. Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO* [*Columbia Broadcasting System*], 364 U.S. 573 (1961).

[10] *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

"installation of all piping or tubing . . . including overhead and underground water mains," which would seem to cover the work in dispute. However, that agreement terminated before Gross Plumbing contracted with Airco to perform the work in dispute, and the evidence indicates that Gross Plumbing had no intention of reviewing the agreement or signing another with the Sprinkler Fitters. Further, there is no evidence that during the time the agreement was in effect Gross Plumbing had employed any employees represented by that Union.[11] In these circumstances, we conclude that the expired Sprinkler Fitters agreement is not entitled to be given any weight in making our determination.

Accordingly, we find that the respective collective-bargaining agreements favor neither group of employees.

2. Employer assignment and practice

In the past, the practice of Gross Plumbing has been to assign the work in dispute to employees represented by the Laborers. Gross Plumbing is satisfied with the results of its assignment and prefers these employees to continue doing the work. Thus, employer preference clearly weighs in favor of awarding the work to employees represented by the Laborers.

3. Area practice

The parties stipulated that no area practice exists for the installation of pipe on the outside of buildings.

4. Employee skills and economy and efficiency of operation

The record indicates that both groups of employees possess the necessary skills to perform the work in dispute. However, Gross Plumbing contends that during the times that pipelaying and joining work is suspended laborers may be assigned to assist other crafts of employees, such as carpenters or bricklayers. Therefore, we find that economy and efficiency of operation favors assignment of the disputed work to the employees represented by the Laborers.

[11] Thus, it is evident that Gross Plumbing's agreement with the Sprinkler Fitters had no application to the former's hiring practices or assignment of work. In this regard, Figler testified that he was unaware that there had been any contractual relationship between these two parties. In such circumstances, it is apparent that this agreement had been entered into as a *pro forma* measure to have application only in the event that Gross Plumbing decided to use employees represented by the Sprinkler Fitters.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees who are represented by Laborers International Union of North America, Local No. 91, AFL-CIO, are entitled to perform the work in dispute. We reach this conclusion relying on employer assignment and practice and economy and efficiency of operation. In making this determination, we are awarding the work in question to employees who are represented by Laborers International Union of North America, Local No. 91, AFL-CIO, but not to that Union or its members. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employess of Gross Plumbing and Heating Company, Inc., who are represented by Laborers International Union of North America, Local No. 91, AFL-CIO, are entitled to perform the work of installing dual-purpose waterlines at the Airco Carbon, Div. of Airco, Inc., Niagara Falls, New York, facility.

2. Sprinkler Fitters Local 703, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Gross Plumbing and Heating Company, Inc., to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, Sprinkler Fitters Local 703, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, shall notify the Regional Director for Region 3, in writing, whether or not it will refrain from forcing or requiring Gross Plumbing and Heating Company, Inc., by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.

MEMBER FANNING, dissenting:

I would honor the disclaimer made by the Sprinkler and Fitters. In my view the effectiveness of the disclaimer is not vitiated by its timing or the small amount of work that remained when it was made. See my dissenting opinion in *Laborers' International Union of North America, Laborers' District*

Council of Western Pennsylvania and Local 910, AFL-CIO (Brockway Glass Company, Inc.), 226 NLRB 142 (1976).

As one of the competing labor organizations had renounced claim to the work in dispute, I would quash the notice of hearing.